1962

C. V. Branham v. Tom J. Jackson and Vera M. Jackson et al : Petition for a Rehearing and Brief in Support Thereof

Utah Supreme Court

LeRoy H. Cox; Elias Hansen; Attorneys for Intervenors and Respondents;
Pickett & Pickett; Attorneys for Plaintiff and Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

C. V. BRANHAM,
Plaintiff and Appellant,

vs.

TOM J. JACKSON and VERA M. JACKSON,
Defendants and Respondents,

BERLIN GLOVE COMPANY, et al.,
Intervenors and Respondents.

Case No. 9412

PETITION FOR A REHEARING
and
BRIEF IN SUPPORT THEREOF

Appealed from the District Court of Washington County,
Will L. Hoyt, Judge

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To the Honorable Members of the Supreme Court of the State of Utah:

Come now the Intervenors and Respondents herein and respectfully petition this Court to grant them a rehearing for the following reasons and upon the following grounds:

1. The Court erred in holding that the Intervenors had not appealed or cross-appealed.

2. The Court erred in holding that merely because the transaction whereby the property in the Frontier Shop was taken into the possession of plaintiff and appellant pursuant to the contract here involved and by him sold entitled him to be paid his claims in full and leave the other creditors who sold merchandise to the Jacksons only a small fraction of the amount owing to them for the merchandise sold to the Jacksons after they took possession.

3. The Court erred in failing to find that the money derived from the sale of the merchandise in the Frontier Shop by plaintiff and appellant should be divided pro-rata among those who furnished merchandise to the Frontier Shop even if the law dealing with Bulk Sales is not applicable.

That on account of the foregoing errors the Petitioners and Respondents have not by the opinion heretofore rendered been awarded their just and lawful portion of the money derived from the sale of the merchandise of the Frontier Shop, and they respectfully request a rehearing, and that the errors complained of be corrected to the end that these Petitioners be awarded their just and lawful portion of the money derived from the sale of said property.

Respectfully submitted,

LeROY H. COX
and
ELIAS HANSEN
Attorneys for Petitioners

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.

I, ELIAS HANSEN, hereby certify that I am one of the attorneys for the Petitioners herein, and the foregoing Petition is not filed for delay, and in my opinion there to merit to said Petition.

ELIAS HANSEN

POINT ONE

The attention of the Court is called to page 9 of the Brief of Respondents where it is said:

> "Pursuant to the provisions of Rule 74(b) the respondents represented by Counsel who represent respondent Berlin Glove Company, et al., cross appeal from that part of the judgment wherein and whereby the sum of $350.00 be allowed as attorney fees paid out of the fund derived from the sale of the merchandise here involved and also from that part of the judgment awarding to appellant the sum of $911.00 as a preferred claim for the fixtures sold out of such fund."

While the respondents did not file a statement of points on which they intended to rely on such Cross-Appeal within the time required by subdivision (d) of Rule 75, appellant likewise failed to comply with such provision. If the respondents are chargeable with such failure, by the same token the appellant is clearly so chargeable.

The parties having submitted the case on the record prepared and filed by appellant, and neither party having complied with the provisions of Rule 75(d), the parties, in effect, are governed by the provisions fo Rule 75(o).

Without repetition we refer the Court to what is said on pages 10 and 11 of Respondents' original Brief.

Moreover, if the fee is for services rendered in connection with the sale of the business, it should be borne by all of those who participated in the fund.

POINT TWO

The Court erred in holding that merely because the transaction whereby the property of the Frontier Shop was taken into the possession of plaintiff and appellant pursuant to the contract here involved and by him sold while holding the property in trust does not entitled him to be paid in full and leave available for all other creditors who sold merchandise to the Jacksons only a small fraction of the amount owing to them for the merchandise so sold.

On pages 2 and 3 of Respondents' Brief there is quoted certain of the provisions of the agrement whereby Branham agreed to sell the Frontier Shop to the Jacksons. We again quote those provisions of such agreement which we deem of controlling importance in this case.

> "D. In the event Jacksons fail, neglect or refuse to comply with each and all of the covenants herein made for their observance that Branham may declare a breach of this agreement and go into possession of said premises and property *as in the first instance*, and all payments made and improvements placed thereon shall become the property of Branham ac liquidated damages for said breach."

"F. In the event of forfeiture as provided for herein Jacksons agree to release to Branham, or his assigns, all property, leases and agreements incorporated and referred to herein." (R. 7 and 8).

By the terms of said agreement the Jacksons went into the possession of the Frontier Shop on August 1, 1958. (R. 14). The contract of sale was not recorded until November 17, 1958. (See notations of County Recorder on bottom of said Contract, Plaintiff's Exhibit 27, and also R. 68 and 69).

In his complaint plaintiff and appellant, among other matters, alleged as one of the breaches of the contract that:

> "Plaintiff is informed and believes and therefore alleges that defendants are now owing over the sum of $2000.00 for merchandise purchased, which amounts are past due for merchandise purchased, which accounts are past due and the various parties from whom said merchandise was purchased have a *lien upon said merchandise for the purchase price.*" (R. 2).

In the Amended Complaint the amount so owing to wholesalers is alleged to be $11,728.97. (R. 15).

That portion of the record which is before the Court shows that there was considerable discussion between the Court and Counsel as to what should be done with the property of the Frontier Shop. (R. 28 to 42). The final result of the stipulation is shown on the record at pages 40 and 41. The pages referred to are in red ink apparently placed there by the Clerk. We quote what is there said:

> "The Court: The stipulations have been rather involved, and wouldn't it be desirable to have it briefly stated:

"It is now stipulated between the plaintiff and defendant and LeRoy Cox representing Strevell-Paterson Company and Salt Lake Hardware Company and Acme Quality Paint Company as creditors of the defendant, that the plaintiff C. V. Branham may continue in possession of the goods and merchandise of the Frontier Shop involved in this proceeding that he may proceed to liquidate the merchandise on hand according to his best judgment, that he will hold all of the proceeds of the sale in a trust account, subject, however, to his right to pay the necessary expenses of conducting the business of selling, that the surplus above that will be subject first to payment of his claim under his contract with the defendant, and the balance shall be subject to disposition under a written assignment by the defendant which he agrees to make for the benefit of the creditors of the defendant, who became such either in connection with the initial purchase of the business by the defendant from the plaintiff or became creditors of the Frontier Shop for merchandise purchased for sale in the course of business, or for supplies and fixtures purchased for use in conducting the business, and that the plaintiff Branham after satisfying the principal and interest owing to him under his contract, may pay the creditors under that assignment subject, however to approval of claims of creditors by the defendant or his attorney, that the possession of the assets shall be held by Branham under the arrangement subject to further order of the court.

Does that cover essentially the stipulations?

Mr. Pickett: Except one matter, that is the attorney fee which will be determined by the court.

The Court: That question of the right of the plaintiff

to an attorney fee is not sipulated one way or the other, but is left for the adjudication of the court.

It is further understood that Counsel after consultation with Mr. Cox and Mr. Hafen will formulate a written agreement for the benefit of creditos of the business referred to and will file that written agreement for the benefit of creditors of the business referred to and will file that written assignment as part of the files in this case and furnish a copy of it to the plaintiff.

Mr. Nelson: The amount of the claim of the plaintiff from the defendant is not agreed upon but will be left subject to stipulation later.

Mr. Pickett: All right.

The Court: It is further understood at this time the defendant does in open court assign the assets of the business subject to the right of the plaintiff C. V. Branham for the benefit of the creditors of the business as referred to in the stipulation, is that correct?

Mr. Cox: Yes.

Mr. Nelson: Yes.

Mr. Pickett: Yes.

The Court: That assignment is to be in effect forthwith, a written assignment to be filed.

Mr. Nelson: Yes."

The trial court further found:

"14. That the merchandise received by Jackson from Branham at the time of the purchase of the business as aforesaid, and the merchandise purchased by Jackson thereafter from others, has been comingled and the merchandise received by Jackson

from Branham remaining on hand at the time of repossession by Branham could not be satisfactorily identified or segregated." (R. 85).

Among the Conclusions of Law made by the trial court are the following:

> "1. That by reason of the Bulk Sales Law the assignment and delivery of merchandise at the Frontier Shop by Tom J. Jackson, et ux, to C. V. Branham cannot operate to give Branham a preference over other creditors of the Jacksons who then held valid claims against Jackson.
>
> "2. That by reason of insufficient identification of merchandise received by Jackson from Branham and later received by Branham from Jackson under the assignment herein, Branham cannot maintain his claim of title or prefernce under his contract with Jackson."

It will be recalled that during the oral argument Counsel for the respondents was aked by one of the judges if the respondents relied upon the Bulk Sales Law, and Counsel replied that respondents did so rely, and also claimed the right to the money awarded to them independent of the Bulk Sales Law.

In Respondents' Brief the terms of the contract between Jackson and Branham, which we deemed of controlling importance, are quoted on pages 2 and 3, and the legal effect of the transaction is argued in Respondents' original Brief independent of the provisions of the Bulk Sales Law.

At no time during the course of the trial did respondents urge upon the court the applicability of the Bulk Sales Law to the facts in this case. However, it is axiomatic that a plaintiff must succeed if at all on the strength of his own case and not

on the weakness of the defendants. Among the numerous cases so holding is *Sowards, et al., v. Meagher,* et al., 37 Utah 212, 225; 108 Pac. 112.

In our original Brief we sought to present to this Court the authorities sustaining the court in such particulars. However, by so doing neither the trial court nor respondents abandoned the claim that they are entitled to participate pro-rata with appellant in the money derived from the sale of the property in the Frontier Shop.

During the course of the trial plaintiff and appellant offered evidence calculated to identify the property which he claims was the property which he sold to the Jacksons.

Appellant filed in this court a list of the merchandise and the prices placed thereon, which are marked 1 to 73, and certified by the parties hereto as being correct. In light of the fact that the trial court found in its Finding No. 14 (R. 85) that the merchandise sold by Branham to Jackson and the merchandise purchased by Jackson were comingled and could not be identified, doubtless plaintiff and appellant realized that no useful purpose could be accomplished by bringing to this Court the testimony of Mr. Branham by which he sought to identify the merchandise which he agreed to sell to Jacksons. Of course, no useful purpose could be served by plaintiff and appellant identifying the merchandise he sold to Jackson if the transaction was subject to the Bulk Sales Law. So also if the transaction were governed by the Bulk Sales Law there was no occasion to record the Contract of Sale of Branham to Jackson. Apparently the recordation of the Contract by Branham was to give notice of his claim of some right to the merchandise which

he sold to Jackson. In our original Brief we have discussed that phase of the case on page 7 thereof. Moreover, the Contract of Sale was executed on the 16th day of July, 1958. Jackson took possession on August 1, 1958. (R. 1). The contract was not recorded until November 17, 1958. (See notation of Recorder on the bottom of the Agreement of Sale marked Exhibit 27.) Obviously the recordation of the Contract of Agreement of Sale on November 17, 1958, could not be constructive notice of Branham's claim to those who furnished merchandise to Jacksons prior to November 17, 1958.

Without burdening the Court with further details sufficient has been said to show that throughout the trial plaintiff and appellant proceeded on the theory that he either owned or had a lien on the property which he sold to Jackson, and which was not disposed of by Jackson, but was repossessed by him.

We again direct the attention of the Court to the provisions of the Contract, which provides in case of breach Branham may go into possession of said premises and property as in the first instance, and all payments made and improvements placed thereon shall become the property of Branham as liquidated damages for said breach, and that "In the event of forfeiture as provided herein Jacksons agree to release to Branham, or his assigns, all property, leases and agreements incorporated and referred to herein."

There is nothing in the foregoing language which even remotely indicates that Branham was to have a right to any merchandise or other property which the Jacksons acquired by purchase. In his Complaint Branham complains "because the Jacksons have breached the Contract of Sale by permitting

a lien to be placed on merchandise purchased and not paid for and in failing to remove such lien." (R. 1 and 2).

Apparently no claim is or could be successfully maintained under the facts in this case that Branham had a Chattel Mortgage on the property here involved. No attempt was made to comply with the provisions of our law dealing with the foreclosure of chattel mortgages. See *U.C.A.* 1953, *Sec.* 9-1-5, 9-1-6, *and* 9-1-7. Nor may it be said that the property was attached pursuant to a Writ of Attachment pursuant to 64(*c*) *Utah Rules of Civil Procedure.* Nor was an assignment made by the Jacksons to Branham in conformity with the provisions of *Title* 6, *page* 666, *Vol.* 1 *of Laws of Utah* 1953.

While the record fails to show a full compliance with the Rule relating to Replevin (64B) the Complaint, the evidence, the Findings of Fact and the Judgment were all calculated to accomplish the results provided for in such a proceeding. The trial court upon its own motion threw in for good measure the matter of the applicability of the Bulk Sales Law. Such matters were mere surplusage and do not destroy the judgment. *Rule* 61 *of Utah Rules of Civil Procedure.*

It is said in the opinion heretofore written that respondents have lost their lien on the property which they sold to the Jacksons and may be estopped from asserting any right thereto. Such a claim is not available to plaintiff because by his pleadings and evidence he made claim only to the property he sold to the Jacksons. The court found that Branham was unable to identify the merchandise he sold to the Jacksons, and, therefore, was not entitled to prevail on such theory.

We have heretofore in our original Brief discussed the

statement made by Counsel for some of the respondents. See page 8 of Respondents' original Brief. We wish to add to what is there said that at the time such statement was made it was apparently believed that plaintiff and appellant was able to identify the property which he sold to the Jacksons. However, having failed to do so, the court was confronted with the situation where plaintiff and the intervenors had furnished merchandise to the Jacksons who were unable to pay for the same. The merchandise was sold by plaintiff while in effect acting as a receiver. He was paid for such service the amount he requested. One of the maxims of equity is that equality is equity. 19 *Am. Jur., Sec.* 455, *page* 315, and cases there cited.

In this case if plaintiff and appellant is entitled to be paid in full and the other creditors to share ratably in the small amount left over, it will result in the property of the intervenors being used to pay the debts of plaintiff notwithstanding by his verified Complaint he admitted that the intervenors had "lien" upon the merchandise sold to the Jacksons, and notwithstanding plaintiff by his verified pleadings and his evidence sought merely to recover the property or the value of the property which he sold to the Jacksons.

The importance of this case far transcends the amount of money involved. Under plaintiff's pleadings and evidence respondents were entitled to believe that the extent of plaintiff's claim to the money derived from the sale of the property here involved was such amount as was derived from the sale of the property which plaintiff agreed to sell to the Jacksons. Had respondents been advised to the contrary they doubtless could have protected their right by throwing the Jacksons into involuntary bankruptcy.

If under proceedings such as those here involved, plaintiff can in effect subject the property of the intervenors to the payment of the debts of plaintiff, then the door is opened for the perpetration of fraud upon those who are engaged in the wholesale business of selling merchandise.

POINT THREE

We adopt what is said under Point Two in support of Point Three.

We respectfully submit that a rehearing should be granted to the end that the errors complained of be corrected.

Respectfully submitted,

LeROY H. COX
and
ELIAS HANSEN
Attorneys for Intervenors and Respondents